
Mainstreaming fire and emergency management into law

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Emergency management is traditionally seen as the responsibility of the emergency services, such as fire brigades and State emergency services. Vulnerability to fires and the ability to protect life, property and other assets, is, however, largely defined by activities and policy settings in other sectors. This interplay of policy means that fire and emergency management should be seen as a whole-of-government and cross-sectoral issue. This article provides examples of how current Australian law may hinder communities to prevent, prepare for, respond to and recover from, the impact of natural hazards and in particular bush or bushfire events. It identifies areas of further research that are required to reduce community vulnerability and increase community resilience to natural hazard events, in particular bushfire events.

Emergency management is traditionally seen as the responsibility of the emergency services; however, vulnerability to fires and the ability to protect life, property and other assets, is largely defined by activities and policy settings in other sectors. This interplay of policy means that fire and emergency management should be seen as a whole-of-government issue. The community expects that different parts of government, along with non-government actors, will operate in a coordinated manner but recent experience in Australia, and elsewhere, suggests that such coordination is often lacking.

Based on experience in other sectors, and most notably environmental policy, it has been suggested that improved community outcomes before, during and after major fire events can be achieved through “mainstreaming”, or the incorporation of fire and emergency management considerations into other policy sectors.

This article will identify why mainstreaming emergency management is required by giving examples of how current Australian law may hinder communities to prevent, prepare for, respond to and recover from, the impact of natural hazards and in particular bush or wildfire events. In mapping law across the “prevent, prepare, respond and recover” (PPRR) spectrum,¹ this article will identify the relevance of law for all areas of emergency management, not just the traditional or visible “response” stage. It will demonstrate that a weakness in the area of emergency management policy is the lack of clear policy objectives; it is not clear what the government and communities are seeking to achieve in fire and emergency management policy. This will show that identifying emergency management policy objectives is the key first step to mainstreaming emergency management in order to reduce community vulnerability and increase community resilience to natural hazard, and in particular bushfire, events.

WHAT IS MAINSTREAMING?

In determining the appropriate policy response to any issue, governments benefit from specialised advice and knowledge and from organisations or departments with a focused mandate and interest.² On the other hand, issues have multiple causes and effects across multiple sectors and therefore

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¹ As used in emergency management and discussed in more detail below.

² Streeton LE, *Report of the Royal Commission to Inquire into the Causes of and Measures Taken to Prevent the Bush Fires of January, 1939, and to Protect Life and Property and the Measures to be Taken to Prevent Bush Fires in Victoria and to Protect Life and Property in the Event of Future Bush Fires* (Victorian Government, 1939) p 7.

specialised and focused agencies may not identify the impact of other policy imperatives in their area, or the impact they have in areas outside their principal area of concern. Policy mainstreaming seeks to make an issue, whether it is health, access and equity, environment, climate change or emergency management, a whole-of-government issue where all policy sectors must have regard to the overarching policy concern.

In discussing the need for a coordinated approach to climate change, Ahmad defined mainstreaming as synonymous with policy integration, ie incorporating “climate policy into other policy sectors”.³ Ross and Dovers define environmental policy integration as the “incorporation of environmental objectives into policy in non-environmental policy sectors, along with aggregation of environmental consequences into policy assessment”.⁴

Policy integration is opposite to policy segregation. Policy segregation “makes it difficult to implement a whole of government approach...[and] may also lead to contradictions and conflict between policy aims or institutional/organisational missions”.⁵ Policy segregation arises when there is no link between players that are involved in the same area. In the context of fire management it has been noted that “[t]hose creating the risk historically have no direct interaction with those dealing with results”,⁶ eg government agencies involved in land-use planning that allow economic or housing development in hazard prone areas, may have no “direct interaction”⁷ with the fire brigades that must attend to fight fires and protect life and property.

If the term “emergency management” is substituted for “environmental” in the definition provided by Ross and Dovers, the following definition of emergency management policy integration or mainstreaming emerges:

Emergency management policy integration [can be] defined as incorporation of emergency management objectives into policy in non-emergency management policy sectors, along with aggregation of emergency management consequences into policy assessment.

Emergency management relates to the entire PPRR spectrum. In this comprehensive approach to emergency management⁸ four types of activities are identified to reduce vulnerability to hazards. They are:

1. Prevention or mitigation activities, which eliminate the hazard or, if elimination is not possible, reduce the impact of the hazard and/or reduce the vulnerability of a community likely to be affected by a hazard;
2. Preparation activities provide plans and education in order to prepare a community to deal with the hazards to which they are exposed;
3. Response activities activate emergency plans and ensure an effective first response to hazards and emergencies which do occur; and
4. Recovery activities assist a community affected by a hazard or emergency to restore physical infrastructure as well as emotional, social, economic and physical well-being.⁹

An integrated policy approach to fire or emergency management would require all policy sectors, when formulating policy that may relate to economic growth, environmental protection or education¹⁰ to take into account the impact their policy choice may have on the ability of a community to prevent, prepare for, respond to or recover from a natural hazard event.

³ Ahmad IH, *Climate Policy Integration: Towards Operationalization* (UN Department of Economic and Social Affairs, 2009) DESA Working Paper No 73, Abstract.

⁴ Ross A and Dovers S, “Making the Harder Yards: Environmental Policy Integration in Australia” (2008) 67(3) AJPA 245 at 246.

⁵ Handmer J, “Institutions and Bushfires: Fragmentation, Reliance and Ambiguity” in Cary G, Lindenmayer D and Dovers S (eds), *Australia Burning: Fire Ecology, Policy and Management Issues* (CSIRO Publishing, Collingwood, 2003) p 142.

⁶ Handmer, n 5.

⁷ Handmer, n 5; but compare *Rural Fires Act 1997* (NSW), Div 8, ss 100A – 1000.

⁸ Australian Government, *Emergency Management in Australia; Glossary* (Attorney General’s Office, 1998) p 24.

⁹ Australian Government, n 8, p 4.

¹⁰ Harrison D, “Whole New World for Geography”, *Sydney Morning Herald* (27 April 2010).

Based on the work of Ross and Dovers, it is possible to distinguish between the *extent* and *strength* of policy mainstreaming. The extent of emergency management policy mainstreaming refers to the width or range of sectors that consider emergency management imperatives, whereas the strength of policy mainstreaming refers to the “relative priority given to...[emergency management] policy integration in the policymaking system, and the energy with which it is pursued”.¹¹ “Extent” is a purely functional or administrative issue, whereas “strength” has a stronger element of normative and political judgments as to the relative importance of different issues.

An impediment to strong mainstreaming is the tendency, in law, to use vague terms or concepts. The law requires people or agencies to act “reasonably”, actions must be “proportionate” to the harm to be avoided, decision-makers may be required to “consult” with or “consider” the views of others. Judges, when developing the common law, and the Parliament when passing statute law, are reluctant to set out obligations in fixed or inflexible ways that do not allow decision-makers to make decisions on a case-by-case basis.

Although Parliaments could pass laws with rigid, clear rules there is little desire to do so. Rigid rules may have unintended consequences in cases that are outside those that were anticipated when the law was passed. To ensure the broader policy objectives are met and new and novel situations can be dealt with, laws are drafted to vest the ministers and departments with the power to make case-by-case decisions, taking into account those factors the Parliament has determined are relevant. These may or may not include issues of emergency management.

For example, the *Environmental Planning and Assessment Act 1979* (NSW) requires development authorities not to provide development consent unless, either:

1. The development complies with the requirements set out in the publication, *Planning for Bushfire Protection*, published by the Rural Fire Service; or
2. They have “consulted” with the Commissioner of the Rural Fire Service regarding measures taken with respect to development in bushfire prone land.¹²

An obligation to “consult” indicates that emergency management considerations are incorporated into the legislation (ie, the *extent* of mainstreaming) but do not define what, or how the consultation is to take place or the weight to be given to the Commissioner’s concerns (ie, the *strength* of the mainstreaming). Adding a similar provision across a large number of legislative instruments would demonstrate extensive policy mainstreaming but the strength of that policy mainstreaming would depend on how decision-makers take the Commissioner’s views into account. A decision-maker may, consistently with the legislative provisions, consult as required, but still decide that whatever adverse impact there may be on emergency management is overridden by other policy considerations, such as the need to encourage economic activity or to address environmental concerns.¹³

An example of stronger mainstreaming can be seen with respect to flood-prone land. In New South Wales, councils are protected from legal liability for actions taken, and advice given, in good faith with respect to the likelihood of flooding.¹⁴ This protection extends to making an environmental planning instrument and granting or refusing a development application as well as carrying out flood mitigation and coastal management works and other steps that councils are obliged to take under any Act.¹⁵ A council is deemed to have acted in good faith if they have complied with the requirements set out in a prescribed flood or coastline management manual.¹⁶ These manuals¹⁷ set out detailed provisions to identify the policy objectives that guide development in flood-prone areas, risk

¹¹ Ross and Dovers, n 4.

¹² *Environmental Planning and Assessment Act 1979* (NSW), s 79BA.

¹³ See, eg *JML Designs Pty Ltd v Blue Mountains City Council* [2008] NSWLEC 1244.

¹⁴ *Local Government Act 1993* (NSW), s 733.

¹⁵ *Local Government Act 1993* (NSW), s 733(3).

¹⁶ *Local Government Act 1993* (NSW), s 733(4), (5).

¹⁷ Australian Government, *NSW Coastline Management Manual* (Department of the Environment, Water, Heritage and the Arts, 1990) <http://www.environment.gov.au/coasts/publications/nswmanual/index.html> viewed 18 February 2011; New South Wales

assessment methodology and appropriate responses to identified risks. These provisions not only direct councils to the relevant manual, they ensure legal protection if they comply with the manual making it clear that flood protection is strongly incorporated into local government decision-making.

As shown by this discussion, analysis of the law can identify the extent of policy mainstreaming, but not always its strength; as the way in which emergency management considerations is taken into account and the weight to be accorded to emergency management compared to other policy objectives will depend on how the law is applied in day-to-day practice. Notwithstanding this limitation, law is the principal tool that legislators use to direct government policy and to require government agencies and others bound by particular law, to apply key policy directions. It follows that identifying how fire and emergency management is incorporated into law and so the “extent” of emergency management policy mainstreaming provides a window on the “strength” of emergency management policy mainstreaming and how it is incorporated into, and reflects, broader policy.

THE NEED FOR MAINSTREAMING: SEPARATING FACT, FEAR AND FICTION

It is often alleged that the community’s ability to prepare for or respond to a hazard, in particular bush fire hazards, has been hampered by policy directions or regulations that do not take into account the need to prepare for and manage a natural hazard event. Whether these claims are based on fact, fear or fiction is hard to determine.

Claims are made that environmental policies or laws stop land use managers from undertaking hazard reduction activities, or that people will face legal action if they undertake hazard reduction or response activities. Although widely made and reported, such claims are largely unsubstantiated by reference to the relevant law. As noted during the discussion on *Timbs v Shoalhaven Council* (2004) 132 LGERA 397, below, people may be relying on assertions as to what the law is, rather than actual knowledge of the law or the process by which they could obtain relevant permission.

Finding supporting evidence for the proposition that individuals would have prepared better for a bushfire, but for local council regulations or pressure from other policy sectors, is not easy. Articles in newspapers and comments in the visual media report such claims but a review of the transcripts of the 2009 Victorian Bushfires Royal Commission has found little direct supporting testimony from individual landowners that these anecdotes reflect actual policy directives from local councils or other organisations.

Some comments suggest that there are problems caused by conflicting policy imperatives or policy segregation. Statements such as the following suggest or claim that there are conflicts between statutory requirements:

[Q] In the issuing of prevention notices, is there particular attention paid in requiring people to create and maintain defensible space around dwellings?

[A] Not if it is in conflict with other legislation, in particular the planning scheme and the requirements to obtain permits to remove vegetation. So the FPN [Fire Prevention Notice] is not used to require people to remove vegetation over 75mm in diameter¹⁸

...

I had recently just finished cutting up a number of trees as we had *illegally* cut down five trees and some branches off the heavily timbered trees.¹⁹ [emphasis added]

...

[There] was never any reduction burn adjacent to our property and I would get the excuse...the greenies were on their back.²⁰

Government, *Floodplain Development Manual* (Department of Natural Resources, 2005) <http://www.dnr.nsw.gov.au/floodplains/manual.shtml> viewed 20 February 2011.

¹⁸ 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Transcript of Proceedings* (11 February 2010) p 14,282.

¹⁹ 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Transcript of Proceedings* (1 March 2010) p 15,938 (emphasis added).

²⁰ 2009 Victorian Bushfires Royal Commission, n 19, p 15,882.

Further, the alleged conflict between environmental planning requirements and other legislation or policy imperatives was noted by Commissioner Pascoe when she said:

When we heard from Mr G...he gave an outline of the full planning scheme in Victoria, particularly the hierarchical nature of it operating from the Act, the state planning and policy framework...it was a fair way down the scheme that overlays came into being. It begs the question whether there is sufficient policy emphasis, as distinct to planning, given to bushfire risk mitigation at a state level.²¹

The alleged conflict between policy imperatives and in particular between environmental and hazard management policies is widely reported in opinion pieces but not verified by clear legal analysis. Miranda Devine, a *Sydney Morning Herald* columnist, reported:

So many people need not have died so horribly. The warnings have been there for a decade. If politicians are intent on whipping up a lynch mob to divert attention from their own culpability, it is not arsonists who should be hanging from lamp-posts but greenies...It was the power of green ideology over government to oppose attempts to reduce fuel hazards before a megafire erupts, and which prevents landholders from clearing vegetation to protect themselves.²²

Former CSIRO bushfire expert David Packham said environmentalists “opposed widespread fuel-reduction burning” and the “folk of the bush have lost their battle to live a safe life in a cared-for rural and forest environment, all because of the environmental fantasies of outraged extremists and latte conservationists”.²³

Stories can be told in a way that enhances the myth that policy segregation is a fundamental problem in emergency management. The story, arising from the 2009 fires, of the Sheahan family provides a demonstration of the way these anecdotal comments or “myths” are portrayed to advance a particular view. The Sheahans had been fined \$30,000 for illegally clearing 250 trees on their Reddy Creek property. Their land was saved during the bushfires while others nearby lost property.²⁴ The family was held up as heroes battling bureaucracies in pursuit of the safety of their property. It was suggested that following their experience there should be changes to native vegetation regulations. What was not explored was the integrity of their story; a story that was easily challenged by further investigation.²⁵ The family may have cleared the land for purposes other than fire safety - the local council had responded at the time to various complaints by neighbours that the clearance may have been for other reasons.

In a similar but unrelated case, a developer cleared a number of trees on his property. The defendant argued that the motive for the tree clearing was “to reduce fire hazards as required by s 63 of the *Rural Fires Act 1997*”.²⁶ This motive was accepted by the trial judge, but only because the prosecution failed to establish, to the requisite standard of beyond reasonable doubt, the allegation that the land clearing had been done in order to allow development that would otherwise be prohibited because of the proximity to native vegetation.²⁷

These stories are told in a way that implies that authorities are preventing residents from adequately protecting their own safety. This is a powerful message to convey and it further supports the view that there is an intractable divide between an environmental approach and an approach to

²¹ 2009 Victorian Bushfires Royal Commission, n 19, p 14,283.

²² Devine M, “Green Ideas Must Take Blame for Deaths”, *Sydney Morning Herald* (12 February 2009).

²³ Cited in Hamilton C, “Fires Spark a New Front in the Culture Wars”, Crikey (16 February 2009) <http://www.crikey.com.au/2009/02/16/fires-spark-a-new-front-in-the-culture-wars> viewed 20 February 2011.

²⁴ Harris E, *Bushfire Battler Story is More Complex Than it Looks*, Crikey (23 March 2009) <http://www.crikey.com.au/2009/03/23/bushfire-battler-story-is-more-complex-than-it-looks> viewed 20 February 2011.

²⁵ Harris, n 24.

²⁶ *Newcastle City Council v Pepperwood Ridge Pty Ltd* (2004) 132 LGERA 388 at [15] per Pain J.

²⁷ *Newcastle City Council v Pepperwood Ridge Pty Ltd* (2004) 132 LGERA 388 at [23], [31]-[33]. Although the motive asserted by the defendant was accepted by the trial judge, the fact that the clearing was done without permission and contrary to council’s tree preservation orders was proved and the defendant was ordered to pay a fine of \$68,000 and ordered to pay the council’s costs, estimated at between \$100,000 and \$150,000.

“manage” the natural environment to enhance human safety. These reports add to the “greenies” versus “the old style bushies” polarisation but are overall unhelpful. They fail to disclose the true extent of any policy conflict or segregation.

A study of relevant law can identify whether or not emergency management has been taken into account in other policy areas, or whether there is genuine policy segregation. Such analysis may show that it is the processes required to ensure that actions taken in the name of safety are genuine and proportionate to the perceived risk that pose the real threat to human safety.

LAW AND THE PPRR SPECTRUM

Laws that have various policy imperatives can impact upon a community’s ability to prevent, prepare for, respond to and recover from a natural hazard event. Examples of how laws may fit within the PPRR spectrum are shown below.

TABLE 1 PPRR Spectrum

<p>Prevention</p> <ul style="list-style-type: none"> • Planning law • Environment protection 	<p>Prepare</p> <ul style="list-style-type: none"> • Planning law • Insurance • Hazard mitigation funding
<p>Response</p> <ul style="list-style-type: none"> • Emergency management legislation • Tort (civil liability) • Legal position of volunteers 	<p>Recovery</p> <ul style="list-style-type: none"> • Planning law • Post event enquiries – coroners, Royal Commissions • Civil liability litigation

Prevention

Laws affect a community’s ability to prevent bushfire, or to prevent a bushfire impacting upon them, by setting limitations on freedom of action and communicating community priorities. These laws are not intended to restrict a measured response to potential threats; they operate so as to deny unreasonable responses, eg a person could ensure that their home was free from risk from a potential bushfire by concreting their entire building block. This would ensure that there was no vegetation to carry the fire from neighbouring properties to their home but would be inconsistent with the amenity of the local area, could exacerbate stormwater runoff and would be prohibited by planning and other laws. Councils have planning rules, tree preservation orders etc to preserve the amenity or essence of their community, to communicate the value that is placed on the natural environment, economic development and other uses to which the land may be put. People are not free to do as they wish on their own land but must obtain approval for clearing and development to ensure competing interests, including an interest in fire safety, are appropriately balanced.

The 2009 Victorian Bushfires Royal Commission argued that the protection of human life had to be the paramount, but not the sole, consideration in land-use planning. They recognised:

This notion of protection of human life being paramount has implications for the balance that is struck between competing community objectives. In the context of bushfires, ensuring the protection of human life means that sometimes compromises will need to be made with people’s freedom to choose where they want to live or the existence of pristine environments close to townships.²⁸

But it is still a balance; if competing interests such as the protection of the environment cannot be maintained while still allowing people to maintain cleared asset protection zones and other fire safety measures, then the answer is not to forsake the environmental assets but to prohibit the construction of dwellings in the area.²⁹

²⁸ Teague B, McLeod R and Pascoe S, 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Final Report* (2010) Vol I, p xxviii.

²⁹ Teague et al, n 28.

Even if there are provisions that allow land owners, with permission, to take steps to prevent fire or the impact of fire, where those procedures are unknown or unduly complex, property owners will be tempted to ignore them and make their own assessment as to what is required.³⁰ A law that is unknown or too complex is likely to be ignored. In his opening remarks to the 2009 Victorian Bushfires Royal Commission, counsel assisting the Commission, Jack Rush QC identified the complexity that faces a homeowner who might wish to clear trees in order to minimise the risk of bushfire.³¹ He said:

The evidence will demonstrate that these [Victorian planning] provisions allow removal (without permit) of native vegetation for purposes of fire threat to a distance of 10 metres from a building used for accommodation. Native vegetation does not include a tree. A permit is not necessary to lop a branch off a tree overhanging the roof of a building providing the building is used for accommodation and the branch is removed for the purposes of fire protection. A permit, apparently, is necessary if one wants to remove part of an overhanging tree for a building that is not used for accommodation.

Within 10-30 metres of the building used for accommodation a permit is not necessary for the removal of native vegetation other than a tree provided 50% of native shrubs are kept and native grasses are kept to at least a height of 100mm.

Beyond 30 metres significant plans and explanation must be provided in relation to clearing around homes and building structures.

There is potentially another layer of regulation that must be complied with depending on the municipality in which one lives. Many municipalities in high risk bushfire areas have a Land Management Overlay, an Environmental Significance Overlay, a Vegetation Protection Overlay, a Bushfire Management Overlay. On their face the planning provisions appear complex and bureaucratic.³²

The *Planning and Environment Act 1987* (Vic) sets out a number of objectives that the Act is designed to meet. Objectives include the “fair, orderly, economic and sustainable use, and development of land”,³³ the protection of resources³⁴ and “the maintenance of ecological processes and genetic diversity”.³⁵ Fire and emergency management are not listed as explicit objectives. The closest reference is the stated objective to:

secure a pleasant, efficient and *safe* working, living and recreational environment for all Victorians and visitors to Victoria.³⁶ [emphasis added]

The location of planning provisions in subordinate provisions of subordinate rules makes them extremely hard to find and impractical for a person with an interest in clearing land to locate. Further, the role of three government departments in the context of planning and fire management suggests there is a degree of policy segregation. The planning rules are managed by the Department of Planning and Community Development while fire management is a matter for the Department of Sustainability

³⁰ Stretton, n 2, p 12.

³¹ Teague et al, n 28, Vol II, pp 229-247; 305-315.

³² 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Transcript of Proceedings*, 20 April 2009, 18 (Rush QC opening comments). The provisions setting out the restrictions on the clearing of native vegetation are set out in cl 52.17 of the *Victoria Planning Provisions* made under the *Planning and Environment Act 1987* (Vic). Victorian Government, *Native Vegetation* (Department of Planning and Community Development, 13 September 2009) http://www.dse.vic.gov.au/planningschemes/aavpp/52_17.pdf viewed 20 February 2011.

³³ *Planning and Environment Act 1987* (Vic), s 4(1)(a).

³⁴ *Planning and Environment Act 1987* (Vic), s 4(1)(b).

³⁵ *Planning and Environment Act 1987* (Vic), s 4(1)(b).

³⁶ *Planning and Environment Act 1987* (Vic), s 4(1)(c).

and Environment, which includes a division for Land and Fire Management,³⁷ and the Department of Justice, which includes both the Office of the Emergency Services Commissioner and the Country Fire Authority.³⁸

Equally legal procedures that are unknown or too complex may be enforced with tragic consequences. In July 1996 and January 1998, the Timbs family contacted their local council in order to obtain permission to remove some trees that they believed posed a danger to their home during high winds that occurred regularly on the property. During the visit in January 1998, a council employee looked at the trees from a distance and declared that he thought they were safe and permission would not be given for the trees to be removed. The evidence was:

Mr Timbs said “we will just cut them down” and the officer said if they did they would have a \$2,000 fine per tree. Mr Timbs said that was ridiculous because the officer had more concern about the trees than his family. The officer repeated that the trees were safe and they could not cut them down.³⁹

During the evening of 28-29 July 1998, a “storm, with exceptionally strong winds, principally from the west, raged”⁴⁰ and one of the trees fell onto the roof of the house, killing Mr Timbs. The morning of the fatal accident, a council officer arrived and said: “You can now chop down the trees, they should not have been twenty metres to the house.”⁴¹ The Court of Appeal held that the council’s officer had been negligent for failing to inspect the tree and, relevantly, for failing to advise the Timbs’ that they could (and should) formally apply for permission and further, if the trees were dangerous they could be cut down without penalty. Hodgson J held:

In the present case, for example, the council officer could have said words to the effect that, on the basis of his inspection, the tree appeared safe and he would not then give permission to remove it, but that it was open to the deceased to obtain his own advice and to make a formal application for permission to remove it; and also that, if the tree was dangerous, it could be removed without council consent. In my opinion, there would then have been no breach of duty.⁴²

The legal reality was that Mr Timbs could have applied for permission to clear the trees (and merely asking a council officer was not “applying”) or it may have been the case that permission was not required to clear the trees. In either case it was not clear that it would have been unlawful to clear the trees, but Mr Timbs, as would most people, relied on the assertion by the council officer that it was illegal to remove the trees with fatal consequences.

Even if a landowner is properly advised, it remains the case that he/she would have to obtain evidence as to the safety of the tree and make the necessary application with the costs involved. If there is evidence that a tree is dangerous or the landowner believes it fits circumstances where it can be cleared without permission then they could remove it. If, however, a council inspector formed the view that prior permission was required, the property owner could face prosecution and would have to bring his/her evidence to court as part of their defence to the criminal proceedings. Defending proceedings in court is time consuming, stressful and expensive.

Another example of policy segregation lies at the other extreme, where people refuse to take appropriate, prescribed safety measures. It has been recommended that planning laws, which require people to provide fire safe zones when developing property, are amended to ensure that such zones are maintained.⁴³ People may refuse, or neglect, to clear fire hazards from their property either because they cannot afford to or do not want to. A policy requiring people to take steps to enhance their own

³⁷ Victorian Government, *Department of Sustainability and Environment* (Victoria Online, 2010) <http://www.vic.gov.au/government-contacts/state-government/department-of-sustainability-and-environment.html> viewed 20 February 2011.

³⁸ Victorian Government, *Department of Justice* (Victoria Online, 2010) <http://www.vic.gov.au/government-contacts/state-government/department-of-justice.html> viewed 20 February 2011.

³⁹ *Timbs v Shoalhaven Council* (2004) 132 LGERA 397 at [14].

⁴⁰ *Timbs v Shoalhaven Council* (2004) 132 LGERA 397 at [8].

⁴¹ *Timbs v Shoalhaven Council* (2004) 132 LGERA 397 at [8].

⁴² *Timbs v Shoalhaven Council* (2004) 132 LGERA 397 at 96 per Hodgson JA.

⁴³ House of Representatives Select Committee into the Recent Australian Bushfires, Parliament of Australia, *A Nation Charred: Report on the Inquiry into Bushfires* (2003) Recommendation 4; Teague et al, n 28, Recommendation 40.

safety may be seen to conflict with other policy imperatives, in particular a stated policy of the common law to allow people maximum freedom to make their own decisions, including decisions that are not in their best interests.

There a number of factors that must be considered when determining whether a defendant owes a common law duty of care to the plaintiff; in context that may be a duty to ensure people take steps to protect their own interests by making sure their home is prepared for fire. One factor that would suggest there was no duty of care is the extent to which the alleged duty would impose on “the autonomy or freedom of individuals, including the right to pursue one’s own interests”.⁴⁴ In the High Court, Gummow, Hayne and Heydon JJ held:

Personal autonomy is a value that informs much of the common law. It is a value that is reflected in the law of negligence. The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law. As Dixon J said in *Smith v Leurs*, “[t]he general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third”. It is, therefore, “exceptional to find in the law a duty to control another’s actions to prevent harm to strangers”.⁴⁵

It would be even more exceptional to find that there was a duty on an authority, such as a council, to require someone to take action to protect their own interests, eg by requiring them to maintain their own property.

The common law of negligence at least is set against finding obligations to protect people from themselves and their own choices whether that is a choice to commit suicide or a choice to live in a fire prone area without taken precautions against fire management. This is an example of policy segregation where the policy of the common law is taking a direction contrary to planning law, and recommendations of bodies such as the 2009 Victorian Bushfires Royal Commission that law should be applied, and councils or other authorities be obliged, to require people to take action for their own protection and in extreme cases, to restrict the rights of people to live where and how they choose.⁴⁶ The difficulty in mainstreaming any policy option across both the common law, and statutory provisions, is discussed in more detail below.

It follows that emergency management considerations are taken into account in land-use planning and environmental legislation. That is there is a wide *extent* of fire and emergency mainstreaming as fire management and personal safety are factors to be considered and balanced in environmental protection legislation, but the evidence suggests that such mainstreaming is not *strong*.⁴⁷ If, however, fire management was too strongly integrated across the environmental policy sector, considerations such as amenity of the environment and issues of cultural, ecological or environmental significance, as well as respecting personal autonomy and choice could be ignored.

It is necessary, therefore, that there is some process to determine whether actions that a land owner or an authority, be it the local council or fire service, wants to take in the interests of fire safety are justified by, and proportionate to, the risk that they face. To allow that to happen, however, the law should be clear, easy to find and easy to apply; the evidence before inquiries such as the 2009 Victorian Bushfires Royal Commission shows that this is not the case. Effective mainstreaming of emergency management into law will need to ensure that all parties, whether they are law enforcement agencies or affected property owners, are able to identify what is permitted, when and in what circumstances.

Preparation

It is inevitable that fires and other natural hazard events will occur so individuals and communities need to be prepared to respond when they do. Organisations like the Country Fire Authority in

⁴⁴ *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 259 ALR 61at [103] per Allsop P.

⁴⁵ *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [88].

⁴⁶ Teague et al, n 28, Vol 1, p xxviii.

⁴⁷ Ross and Dovers, n 4.

Victoria,⁴⁸ the Rural Fire Service in New South Wales⁴⁹ and local councils give guidance to property owners on how to prepare their property, and themselves, to deal with bushfires. The use of planning tools such as the *Bushfire Management Overlay*⁵⁰ impose extra planning controls on developments in bushfire prone areas to ensure that development takes into account, and is built to withstand, the expected hazard event.

Other areas of law may, however, discourage or detract from the ability of a community to prepare to deal with hazards. In the event of a significant fire, it is not the property owners that face the largest financial burden but the insurers. This may be an example of segregation where the financial losses will be borne by a part of the community (the insurers) that do not have the day-to-day management of the risk (the property owners).

Insurance is an essential aspect of preparation and resilience by spreading the risk of disaster across the community and providing necessary funding to allow communities to recover from catastrophic events. On the other hand, insurance practices may discourage homeowners from taking steps to ensure their property is “fire safe” on the basis that if the home is lost, fire insurance will assist in rebuilding. Further, it is cheaper to pay an insurance premium and claim on the policy in the event that the property is lost than to spend the money that may be required to adequately prepare the property for fire. If insurance companies provided grants to assist in making a home defendable, or if premiums were adjusted to reflect the actual risk of each property, then there would be financial incentives to take steps to prepare a property against the risk of fire.

There is, however, little incentive for insurance companies to take steps to encourage property owners to prepare their homes. Although news stories report the dollar value of claims following significant fire events, the reality is that these amounts are planned for by insurance companies and the payouts are factored into their investment and re-insurance programs. Henri notes that the home insurance industry plans for, or expects, about 4,500 homes to be lost to fire each year. The 488 homes that were lost in the Canberra bushfires of 2003 made significant news, given the number of homes lost in a single event, but such losses do not significantly impact upon the insurers’ profitability.⁵¹ The Insurance Australia Group, which includes the NRMA and CGU insurance companies, reported that although the Group made a net loss of \$83 million in 2002-2003 it returned to a profit of \$217 million in 2003, notwithstanding significant claims arising from the Canberra fires, and continued to report a profit in 2004 and 2005, again notwithstanding its exposure to claims from the 2005 Eyre Peninsula fires in South Australia.⁵²

There has been considerable work on the role of insurance companies and the impact of insurance on emergency preparation and vulnerability but this work has largely been in the area of flood, rather than fire, insurance⁵³ or based on experiences outside Australia. In the United States, the presence of widespread flood and earthquake insurance, provided by the Federal Emergency Management Agency, has been criticised as contributing to vulnerability by encouraging people to build on flood or earthquake affected land.⁵⁴

It has been argued that United States federal policies to fund hazard mitigation, although intended to prevent the impact of disaster and develop resilient communities, in fact encourages development in high-risk environments and further exposes the poor to the highest risk. The argument is that communities cannot afford risk mitigation so land values are low. Poorer members of the community

⁴⁸ Country Fire Authority, *Residents*, <http://www.cfa.vic.gov.au/residents/index.htm> viewed 20 February 2011.

⁴⁹ Rural Fire Service, *For the Community*, http://www.rfs.nsw.gov.au/dsp_content.cfm?cat_id=1001 viewed 20 February 2011.

⁵⁰ Victorian Government, *Bushfire Management Overlay* (Department of Planning and Community Development, 2009) http://www.dse.vic.gov.au/planningschemes/aavpp/44_06.pdf viewed 20 February 2011.

⁵¹ Henri C, “Fire Policy: An Insurance Perspective” in Cary G et al, n 5, p 162.

⁵² Insurance Australia Group, *Annual Report 2005* (IAG, 2005) p 40.

⁵³ See, eg Smith D and Handmer J (eds), *Residential Flood Insurance: The Implications for Floodplain Management Policy* (Water Research Foundation of Australia, 2002).

⁵⁴ Burby R J, “Unleashing the Power of Planning to Create Disaster-Resistant Communities” (1999) 65(3) JAPA 247.

move in as that is the only land they can afford. When the hazard event strikes the existing population is affected and federal agencies step in to rebuild the communities and develop hazard mitigation programs. Once the rebuilding has been done land values rise and wealthier and more politically-astute communities move in that insist that mitigation structures are maintained even though the area is a high-risk one that should not have been developed.⁵⁵

The implications of fire insurance and hazard mitigation in Australia warrants further study.⁵⁶ It would be useful to identify whether insurance may, inadvertently, encourage development in areas that expose communities to the impact of natural hazards and thereby increase vulnerability. If that is the case, it would be helpful to identify appropriate policy and legal responses to ensure the benefits of insurance for recovery are maintained, without unanticipated costs to community vulnerability.⁵⁷

Response

During an actual hazard event, such as a fire, the management of the response is a mainstreamed activity and there are legislative provisions in place to ensure a whole-of-government response to the emergency.⁵⁸ The provisions in Victoria are the broadest to ensure that all government policy can be directed toward the emergency response. During a declared disaster, the Minister for Police and Emergency Services may direct a government agency to do, or not do, anything and to exercise, or not exercise, any function or power. The Minister may also suspend any Act or regulation where compliance with that law would “inhibit response to or recovery from the disaster”.⁵⁹

When there is an actual emergency in progress, the law allows the requirements of the emergency response to take precedence over other legal restraints; however, the exercise of extraordinary legal powers, including the power to suspend the operation of legislation discussed above, require as a pre-condition that a disaster or emergency is formally declared. This has rarely, if ever, been done. During the 2003 Canberra bushfires, a State of emergency was not declared until 2:45pm on the 18th January,⁶⁰ about one hour before the fires impacted urban Canberra and some 10 days after the fires started. The declaration was made to give the police the power to order evacuations, even though the fire authorities did not feel that this was required.⁶¹ Although the police did evacuate areas of Canberra, there was no evidence that they required, or used, the power to forcibly order people to leave.⁶²

The 2009 Victorian Bushfires Royal Commission reported:

No serious consideration was given by any witness to advising that a State of Disaster be declared on 7 February 2009, and no witness was aware that this had been considered by anyone else. Indeed, [the] Deputy Commissioner [of Police]...did not believe that a State of Disaster had ever been declared under the Emergency Management Act.⁶³

⁵⁵ Burby, n 54.

⁵⁶ Some of which is being funded by the Bushfire Cooperative Research Centre; see Carter RA, *Catastrophic Events, Insurance and Sufficient Funding for Fire Services – A Legal Perspective* (poster presented at the AFAC Conference, Darwin, 2010).

⁵⁷ See Australian Broadcasting Corporation, *A Byron Bay Beach Barney, The Law Report* (9 February 2010).

⁵⁸ *Disaster Act 1982* (NT); *Emergency Management Act 1986* (Vic); *State Emergency and Rescue Management Act 1989* (NSW); *Disaster Management Act 2003* (Qld); *Emergencies Act 2004* (ACT); *Emergency Management Act 2004* (SA); *Emergency Management Act 2005* (WA); *Emergency Management Act 2006* (Tas).

⁵⁹ *Emergency Management Act 1986* (Vic), s 24(2).

⁶⁰ Doogan M, *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires Between 8 and 18 January 2003* (ACT Coroners Court, 2006) p 345.

⁶¹ Doogan, n 60, p 346.

⁶² Doogan, n 60, pp 363-367.

⁶³ Teague B, McLeod R and Pascoe S, 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Interim Report* (2009) p 264; Teague et al, n 28, Vol II, pp 86-87.

One concern with declaring a state of emergency during the 2003 Canberra fires was that the declaration would see legal control over the response move from the fire service to the police.⁶⁴ To ensure the response to the fire was managed by fire authorities, the Chief Fire Officer was appointed as the “Alternate Controller” as soon as the state of emergency was declared and the Controller’s powers were delegated from the Chief Police Officer to the Chief Fire Officer.⁶⁵ It is conceivable that a declaration of a state of emergency or disaster will often be resisted if it means that control moves from the specialist combat agency (the fire brigades or the State Emergency Service) to the police who are not experienced in the management of fires, floods or other hazards.

Emergency management legislation and legislation governing the particular emergency services provides that the incident controller can exercise significant powers to control access to a hazard area and take command of resources. The incident controller has to authorise emergency workers, who are usually volunteers, to give effect to his/her directions. Doubt as to the legal position of volunteers may inhibit emergency response. Volunteer emergency workers may be concerned that they may be liable for assault⁶⁶ if they use any degree of physical force to ensure compliance, but if they do not ensure compliance with the evacuation order and a person is injured or killed, they may be liable in negligence. This is another example where there may be divergence in policy aims between preserving life and safety and respecting personal choice and autonomy.

Doubt about their legal position may impact upon the willingness of volunteers to respond, to take on senior positions or to enforce the decision of incident controllers. Paid or employed emergency service managers also question their legal responsibility for the actions of the volunteers that they are required to supervise or manage.

This is, again, an example where there is mainstreaming of emergency management but the mainstreaming is not strong. Emergency provisions have not been used because of uncertainty about their effect, because of a fear that will transfer control of the response for a specialised agency to police or because of reluctance by authorities to exercise emergency powers such as the power to order evacuation. Striking a balance between the need to encourage and empower volunteers and the emergency services while, at the same time, ensuring emergency services remain accountable to the community,⁶⁷ is a matter that requires further work to ensure effective and strong mainstreaming of emergency management imperatives.

Recovery

Once an emergency is over, people look to rebuild and inquiries are conducted into the management of and response to the hazard.

Destruction of homes and other property identifies an underlying vulnerability to the hazard involved. If homes are rebuilt in the same style, and in the same place, their vulnerability is replicated. Allowing people to rebuild and return may be evidence of the community’s resilience but inadequate planning, and failing to address the issues that created vulnerability, means that people will return to a community that remains vulnerable to the hazard.⁶⁸ The process of rebuilding and recovery is an opportunity to apply new knowledge, modern building standards and planning ideas to allow a community to recover in a way that is better prepared for the next hazard impact.⁶⁹ Surprisingly,

⁶⁴ Doogan, n 60, p 345.

⁶⁵ Doogan, n 60, p 346.

⁶⁶ *Collins v Wilcock* [1984] 3 All ER 374; [1984] 1 WLR 1172 (any touching is an assault, there does not need to be hostility or injury).

⁶⁷ Ipp D, *Review of the Law of Negligence: Final Report* (Australian Government, 2002) at [11.22], [11.23]; Australian Emergency Management Volunteer Forum, *Legal Protection* (2008), <http://www.aemvf.org.au/?s=legal> viewed 20 February 2011.

⁶⁸ Teague et al, n 28, Vol II, p 249.

⁶⁹ Cowan J, “Marysville Should Never Have Been Rebuilt, Commission Told”, *ABC Online* (15 February 2010) <http://www.abc.net.au/news/stories/2010/02/15/2819672.htm> viewed 28 June 2010; see also 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Transcript of Proceedings* (15, 16 February 2010).

following the 2009 Victorian fires, planning laws were in fact relaxed to allow homeowners to rebuild “without needing to comply with the normal requirements of the planning scheme”.⁷⁰ This policy was subject to criticism by the Royal Commissioners who claimed:

The State’s efforts to quickly rebuild homes and communities in order to help people heal and to deal with practical problems such as homelessness ... put short-term social welfare considerations above the longer term safety of the community. Murrindindi Shire Council’s Local Planning Policy Framework illustrates this wish to rebuild without considering how to accommodate future bushfire risk.⁷¹

Following a significant event, emotions are high and feelings of loss of control and having been let down by the emergency services can lead to criticism and complaints of the response. When there has been significant losses, such as in the 2003 Canberra fires or the 2009 Victorian fires, various reviews and inquiries will point out places where alternative decisions may have lead to different outcomes and this can quickly become characterised as a “mistake” or “negligence”. There may be a number of inquiries held into the same event, each with different objectives and terms of reference. Inquiries following a major fire or other emergency range for internal “lessons learned” exercises, to multi-agency enquiries, specialised inquiries that may or may not be public, Parliamentary inquiries to Royal Commissions.⁷² After the 2003 New South Wales and Canberra fires there was a government review,⁷³ coronial inquests in New South Wales and the Australian Capital Territory,⁷⁴ a Federal Parliamentary Inquiry⁷⁵ and civil litigation.⁷⁶

Courts are necessarily independent of government (the separation of power between the judiciary and the legislature, at least at Commonwealth level is enshrined in the Australian Constitution).⁷⁷ Judicial officers are expressly required to apply the law without favouring government or government policy over private rights.⁷⁸ The effect is that policy adopted by emergency managers and governments may not be reflected in the law as developed by the judiciary. As discussed, above, an area of interest to the common law is respect for personal autonomy and the right of people to make their own decisions, including decisions that may have fatal consequences.⁷⁹ The result is that laws that are intended to limit freedom of action, eg:

- freedom to live where one wants to live – even in hazard rich areas;
 - freedom to behave as one wants – to “stay” rather than “go” when faced with a hazard; and
 - freedom of suspected or previously convicted arsonists to move about when not under sentence,
- will be strictly interpreted. Clauses that are intended to protect emergency and other services from legal liability will be read down and with the most restricted interpretation that the words will allow.⁸⁰

After event reviews may be conducted by legal or judicial officers. Principally these will be coroner’s inquests and Royal Commissions. Again these agencies are fiercely independent and would resist any attempt to require them to take into account or promote stated government policy in

⁷⁰ Victorian Government, *Planning Process* (Murrindindi Shire Council, 14 January 2010) http://www.murrindindi.vic.gov.au/Page/Page.asp?Page_Id=968&h=1 viewed 20 February 2011.

⁷¹ Teague et al, n 28, Vol II, p 249.

⁷² Drennan LT and McConnell A, *Risk and Crisis Management in the Public Sector* (Routledge, 2007) p 181.

⁷³ McLeod R, *Inquiry into the Operational Response to the January 2003 Bushfires in the ACT* (Australian Capital Territory Government, 2003).

⁷⁴ Milovanovich C, *Coronial Inquiry into the Circumstances of the Fire(s) in the Brindabella Range in January, 2003* (NSW Coroners Court, 2003); Doogan, n 60.

⁷⁵ House of Representatives, n 43.

⁷⁶ *West v New South Wales* [2008] ACTCA 14 and ongoing in the ACT Supreme Court. The matter is expected to be finalised in 2011. See also Kanowski PJ, Whelan RJ and Ellis S, “Inquiries Following the 2002-2003 Australian Bushfires: Common Themes and Future Directions for Australian Bushfire Mitigation and Management” (2005) 68(2) *Australian Forestry* 76.

⁷⁷ *Australian Constitution*, Ch I (The Parliament), Ch II (The Executive Government) and Ch III (The Judicature).

⁷⁸ See, eg *Crown Proceedings Act 1988* (NSW), s 5(2).

⁷⁹ *Rogers v Whitaker* (1992) 175 CLR 479; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.

⁸⁰ *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105.

reaching their conclusions. They are often very critical of government agencies and their response⁸¹ and would wish to remain free to express that criticism. In the absence of specific legislative requirements they are not required or able to advance stated government policy (to the extent that such policy can be identified) and this may represent effective policy segregation between the administrative and judicial arms of government.

Judicial proceedings may not, necessarily, assist with recovery or identify issues for future improvement. A Royal Commission may give people who have been adversely affected the opportunity to tell their story, to be heard by government and to have their experiences taken into account, but limitations imposed by governments in the resourcing of the Commission or in the terms of reference may restrict the Commission's ability to investigate the role of government or government policy. An inquiry may be given terms of reference that direct it to look at the causes of, and responses to, an incident without looking at the broader government policy.⁸² Further outcomes may be politically structured (an inquiry cannot produce a report that would be politically impossible or too costly to implement) and the inquiry can be set up to ensure that criticism is deflected from government to officials or other causes.⁸³

Whether Royal Commissions or coroner's inquests are able to achieve their stated aims and contribute to improvements in emergency management is also a matter of some debate. In his opening to the 2009 Victorian Bushfires Royal Commission, Rush QC said:

One can lose count of the number of major inquiries and reports, of one form or another in to bushfires in Australia in recent years.

Victoria has produced an inquiry and report in the 2003 bushfires, a report concerning the 2006 bushfires. The Auditor-General reported on the 2003 bushfires, there has been an inquiry into the impact of public land management practices on bushfires in Victoria.

There has been a Commonwealth Parliamentary inquiry into fire, a COAG report on fire, NSW, South Australia, Western Australia have produced significant reports on fire, the list of inquiries, reports is long, the recommendations many.

Yet despite the reports and inquiries and recommendations in such a relatively short period of time on 7 February 2009 this State suffered a fire catastrophe.⁸⁴

A coroner "may comment on any matter connected with the death [or fire] including public health or safety or the administration of justice".⁸⁵ This allows coroners to expand their inquest to consider matters such as the response to a particular incident. Notwithstanding the power of the coroner to make recommendations to avoid future deaths or fires, their recommendations are often largely ignored. A survey of 484 recommendations arising out of 185 coronial inquests held between 2002 and 2004 found:⁸⁶

- 147 (30%) were fully implemented;
- 24 (5%) were put in place before the inquest or inquiry concluded;
- 43 (9%) were only partially implemented;
- 61 (13%) were not implemented at all; and

⁸¹ See, eg Doogan, n 60.

⁸² Toft B and Reynolds S, *Learning from Disasters: A Management Approach* (Butterworth-Heinemann, 1994) p 22; Prasser S, "Royal Commissions in Australia: When Should Governments Appoint Them?" (2007) 65(3) AJPA 28.

⁸³ Boin A, McConnell A and 't Hart P (eds), *Governing After Crisis: The Politics of Investigation, Accountability and Learning* (Cambridge University Press, 2008).

⁸⁴ 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Transcript of Proceedings* (20 April 2009) p 4 (Rush QC, opening comments).

⁸⁵ *Coroners Act 1985* (Vic), ss 19(2), 37(2).

⁸⁶ Watterson R, Brown P and McKenzie J, "Coronial Recommendations and the Prevention of Indigenous Deaths" (2008) 12(2) AILR 4 at 8. The survey involved all inquests that produced recommendations and that were identified in the National Coroners Information Service for the period 2002-2004 in the Australian Capital Territory and Tasmania, 2003-2004 in the Northern Territory and in 2004 in the other Australian jurisdictions, except Queensland. The recommendations related to all deaths, not specifically indigenous deaths or deaths in custody but not inquiries into fires or explosions.

- for 209 (43%) there was either no information available on the fate of the recommendation, or from what information there was, it was not possible to determine whether the recommendation had been implemented or not.⁸⁷

The fate of these recommendations, with 270 (56%) either not implemented or unable to be accounted for, demonstrates a systemic failure to take heed of the lessons “hard-learned from the loss of individual lives”.⁸⁸

The findings of Royal Commissions and coronial inquests are not binding on government or others. A commissioner or coroner may make recommendations but whether or not they are acted upon is a matter for government or the organisation or the department that is the subject of the recommendations.⁸⁹ They are entitled to reject the recommendations if they are of the view that they are unhelpful, impracticable or if circumstances have changed between the event under investigation and the publication of the final report. There has, to date, been no obligation to report back to the coroner or commissioner on any response to, or implementation of, their recommendations.

In New South Wales there has been an attempt to “close the loop” with the passage of the *Coroners Act 2009* (NSW). This new Act requires that any recommendation must be referred to the State coroner and the relevant minister. Government policy requires a government agency or department that is the subject of a coronial recommendation to report, within six months,⁹⁰ their response to, and their progress in implementing, those recommendations. This Act may go some way to learning the lessons exposed by coroners but it remains the case that whether or not the recommendations are implemented is a matter for the government and the subject agency.

Commissions may set up false expectations. Inquiries may be set up with high ideals to identify lessons learned from a hazard event but they may set out with over reaching expectations and may ask, or be asked to answer, the wrong question.⁹¹ Commissioner Teague, in opening the 2009 Victorian Bushfires Royal Commission, asked:

What can be done to ensure that so many lives are not lost, that so much devastation is not caused, in such bushfires in the future?⁹²

The answer to that question must be hard to judge. Another fire on another day may lead to more lives lost if it is unfortunate enough to impact upon a populated community at a peak time, although that would not necessarily mean that the preparations had been inadequate or the response poorly managed. The impact of one fire cannot be compared to the impact of another as they are, necessarily, different fires impacting different communities in different times and circumstances. A future fire that causes the deaths of more people may, however, have less impact than it might have if prior recommendations had not been made and followed. The problem with posing questions such as this is that it leads to an expectation that the success of commissions and inquests can be judged by the number of people killed or the value of property damaged. Julian Burnside QC, counsel for the Chief Officer of the Country Fire Authority Mr Russell Rees, put it this way:

What I think has not been done is to ask, “How many lives were saved?”...to point to the number who died is to look at only half the equation and to judge the performance of Mr Rees or anyone else by reference to the number who died is to ignore the larger part of the picture.⁹³

Whether or not Royal Commissions, inquests or litigation achieve desirable results in finding out lessons to be learned from the preparation for and response to a fire or other hazard, the fear of

⁸⁷ Watterson et al, n 86, pp 9-11.

⁸⁸ Watterson et al, n 86, p 19.

⁸⁹ See Sheales R, “Brumby Won’t Commit to Fire Recommendations”, *ABC Online* (5 February 2010) <http://www.abc.net.au/news/stories/2010/02/05/2810994.htm> viewed 20 February 2011.

⁹⁰ New South Wales, Parliamentary Debates, Legislative Council, 4 June 2009, p 15,781 (The Hon John Hatzistergos, Attorney-General).

⁹¹ Boin et al, n 83; Prasser, n 82.

⁹² 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Transcript of Proceedings* (20 April 2009) p 2 (The Hon Bernard Teague, Chairman, opening comments).

⁹³ 2009 Victorian Bushfires Royal Commission, n 28.

litigation or being called to give evidence before a court or a Royal Commission may be an impediment to encouraging people to volunteer for the emergency services and for incident management teams in particular. A fear of liability is unfounded as individual fire-fighters will not be liable for their actions;⁹⁴ the real issue may be fear of being asked to give evidence either before a commission of inquiry or a court of law. If the legal system or the post-event inquiry system with a legal “philosophy, procedures and ethics”⁹⁵ inhibits witnesses and reduces people’s willingness to volunteer for the emergency service, then that needs to be identified and addressed.

Notwithstanding their limitations, post-event inquiries are necessary to try to identify what might have been done differently, anywhere in the PPRR cycle, to reduce vulnerability, to enhance response and to promote recovery. What needs to be considered to avoid policy segregation is how to deliver “lessons learned” inquiries that are not counter-productive because they discourage volunteers, produce recommendations that are out of date or impractical or become embroiled in political or partisan arguments or inflict further trauma on witnesses and those exposed to the disaster. Blame can in some circumstances be justified⁹⁶ but identifying how policy and systemic structures exposed a community’s vulnerability to a particular hazard will be more useful in the long run.⁹⁷ It follows that the form and nature of post-event inquiries and investigative processes must be the subject of research. Reforming the inquiry process to ensure that the lessons are learned, without high collateral costs, should be an objective of mainstreaming emergency management into judicial and quasi-judicial proceedings.

THE WAY FORWARD

The discussion above shows that anecdotal and press reports suggest that emergency management and planning have been ignored or sacrificed to advance other interests, such as protection of the environment. The reality is not that stark emergency and fire management considerations are relevant in many policy sectors, suggesting that emergency management is a mainstream consideration, but that the strength of emergency management mainstreaming⁹⁸ is not clear. There is evidence that emergency management is not a priority in land-use planning legislation. Insurance and hazard mitigation programmes may in fact increase vulnerability by encouraging people to live in hazard prone areas and may not accurately price the cost of the risk. Response arrangements may shift, at the times of highest crises, responsibility from specialised agencies such as the fire brigades or State Emergency Services to a minister or the police. Post-event actions to learn the lessons from a response may at best be ineffective, and at worst positively harmful to steps to ensure resilience and preparation before the next hazard event. Whether there are adverse consequences as a result of policy conflicts or policy segregation will vary from case to case and may be difficult to identify.

More effective mainstreaming of fire and emergency policy into law will ensure that the impact of emergency management across all sectors will be identified and considered and this, it is suggested, will lead to better outcomes across the PPRR spectrum of emergency management. This will be a

⁹⁴ Legislation has been enacted in all Australian jurisdictions to ensure that volunteers are not personally liable (see, eg *Civil Liability Act 2002* (NSW), s 61), and that employers are liable for the negligence of their employees (see, eg *Employees Liability Act 1991* (NSW), see also *Insurance Contracts Act 1984* (Cth), s 66). Where litigation has been commenced against individuals, agencies have quickly stepped in to ensure that the State is liable for the negligence (if any) of employed or volunteer emergency workers; see, eg *Gardner v Northern Territory* [2004] NTCA 14; *New South Wales v Fahy* (2007) 232 CLR 486; *West v New South Wales* [2008] ACTCA 14.

⁹⁵ Toft and Reynolds, n 82.

⁹⁶ Hope NA, *Inquest into the Deaths of Trevor George Murley, Lewis Kenneth Bedford and Robert Wayne Taylor* (WA Coroners Court, 2009) p 31.

⁹⁷ 2009 Victorian Bushfires Royal Commission, Parliament of Victoria, *Transcript of Proceedings* (27 May 2010) p 20,702 (Burnside QC), p 20,717 (Myers QC), p 20,751 (Clelland QC).

⁹⁸ Ross and Dovers, n 4.

matter of increasing importance in future years as the impact of climate change is expected to lead to more severe and widespread natural disasters, including fires and storms.⁹⁹

Mainstreaming emergency management does not mean forsaking all other considerations and policy objectives. Mainstreaming requires that emergency management objectives are considered when determining how to achieve various policy objectives; but competing policy objectives still need to be balanced rather than having one trump all others. Emergency management, even if considered a mainstream and whole-of-government priority cannot, or should not, assume the role of the dominant or sole policy objective. If it did the forests would be destroyed and other choices diminished. At the extreme Victoria could be made fire proof by covering it with concrete and placing a fire engine and crew at every home. That is not an option even if it would reduce to zero the chance of anyone dying in a bushfire. It would destroy the economy and the natural environment.

Deciding how competing demands will be assessed and balanced, requires a clear view on what are the policy objectives, ie is what is emergency management policy meant to achieve? After significant events with large-scale losses of life and property, the immediate reaction is to seek policy solutions to ensure that “it doesn’t happen again”; but as a policy objective that is imprecise, impracticable and as many years of bushfires have shown, unrealistic. Equally, an objective “to ensure that so many lives are not lost, that so much devastation is not caused, in such bushfires in the future”¹⁰⁰ is neither specific nor measurable. More people died in the 2009 fires than in the 2003 fires, the Ash Wednesday fires of 1983 or the 1939 Victorian fires but that does not automatically mean that the lessons from those earlier fires were ignored or the 2009 response was less efficient, less organised or that the preparations were less suitable or adequate.

Until there is a clear and specific goal or objective of emergency management policy, it is impossible to identify how that policy can be mainstreamed or the success (or otherwise) of the policy measured. Whatever objectives are selected, different legal and policy tools will be required to achieve them. A clear, specific and measurable goal may be “no one will die in a bushfire” but that will lead to a very different policy response than if the goal is to ensure that “there will be no bushfires”. The latter is unachievable. The former might be achievable but the methods to achieve that may range from improving building design, communication, education and preparing people to live with fire. An alternative objective may be that “people can choose to live with the risk of fire but only if they informed of and understand that risk”. That, again, would require a different policy response to ensure that people are informed, rather than to address the risk of the outbreak of fire.

It follows that the critical first step in achieving effective and balanced mainstreaming of emergency management objectives is:

1. identify what are, or legitimately should be, the objectives of emergency management policy; then
2. identify a suite of policy and legal tools to allow governments and communities to achieve the chosen objectives.

In the absence of clear policy goals, mainstreaming will remain an impossible goal where emergency management considerations will be considered the predominate policy concern in the immediate aftermath of events such as the 2009 Black Saturday fires but rescind while people and communities try to deal with other issues, including issues about maintaining community amenity and environment, only to rise again after the next significant hazard event. If the disaster cycle is to be broken it is imperative that governments now set realistic disaster management goals; goals that must be more specific than “it must never happen again”.

CONCLUSION

This article has outlined the need to mainstream emergency management policy and found that government policy is so constrained and enabled by law, that mainstreaming emergency and fire management policy will require that these considerations are incorporated into law. Ways in which law

⁹⁹ Pearce T, Handmer J, Higgins J, King D, McDonald J, Pagano F, Schneider J, Whetton P, *National Climate Change Adaptation Research Plan for Emergency Management* (National Climate Change Adaptation Research Facility, 2009) p 4.

¹⁰⁰ 2009 Victorian Bushfires Royal Commission, n 92.

can impact upon a community's ability to prevent, prepare for, respond to and recover from a natural hazard event, and in particular a bush or wildfire have been noted. It is still the case, however, that the impact of law upon the PPRR spectrum is unclear, informed often by anecdotal stories rather than legal analysis and with the suggestion that it is in fact the legal processes rather than the law per se, that is, in many circumstances, the problem.

If fire and hazard management is to be considered a whole-of-community issue, and not just a matter for the emergency services, further research is required to understand what impact broader law and policy have on emergency preparedness and response and how the chance of achieving policy objectives, once defined, can be enhanced by law and policy reform.